* HIGH COURT OF DELHI

% Date of decision:April 11, 2008

\+ FAO(OS) 184/2005 & CM 8997/2005

M/s Rajiv Associates Pvt. Ltd. …Appellant
through
Mr.D.Moitra, Adv.

Versus

The Chief Engineer (ARC) & Ors. …Respondents.
through
Mr.S.K.Chandwani, Adv for
Respondents 1 & 2.

Coram :

Hon'ble Mr.Justice Manmohan Sarin
Hon'ble Mr.Justice Manmohan

(1) Whether reporters of local paper may be allowed to see the judgment?

(2) To be referred to the reporter or not? Yes

(3) Whether the judgment should be reported in the Digest ? Yes

Manmohan Sarin, J.

1. Appellant-M/s.Rajiv Associates Pvt. Ltd. assails the order dated 10th January, 2005 of the learned Single Judge dismissing CS(OS) No.1838A/1998, being a petition under section 20 of the Arbitration Act, 1940 (hereinafter referred to as the `Act'). The present appeal was filed belatedly on 2 June, 2005. Appellant has also filed an application being CM 8997/2005 under Section 5 of the Limitation Act seeking condonation of delay of 97 days in institution of the appeal.

2. We have heard Mr.D.Moitra, learned counsel for the appellant in support of the appeal as also the application for condonation of delay. The facts in brief culminating in filing of the present appeal may be noted:-

(i) Respondent-Airport Authority of India had invited tenders for construction of service road connecting NH-8 to BPCL Installations at Brijwasan. M/s.Rajiv Construction Company had submitted tender and was the successful bidder and was awarded the contract. Disputes and differences had arisen between the contractor and the respondent-Airport Authority of India which were referred to arbitration of respondent no.3 one Mr.K.K.Reddy as Arbitrator in terms of arbitration agreement contained in clause 25. The Arbitrator entered upon reference on 3rd July, 1989.

(ii) It is the appellant's case that respondent-Airport Authority of India did not file its counter statement on account of its records as well as measurement books having been sent to CBI. Respondent stated that they would submit counter statement of facts as soon as same were received. The Arbitrator held the first hearing on 18th September, 1990. The next date of hearing was fixed as 3rd January, 1991. Respondent did not appear before the Arbitrator but stated that they would have no objection to enlarging the time and that as soon as the records of the

contract were received from CBI, they would inform the Arbitrator. The Arbitrator called for a hearing on 20th August, 1997 for enlarging the time for making the award but the respondent did not agree to the enlargement of the time. The Arbitrator thereupon resigned on 20th September, 1997.

(iii) Respondent declined its consent for appointment of another arbitrator on 12th January, 1998 and to pay the final bill. It is, in these circumstances, that the appellant filed the petition under Section 20 of the Act for appointment of an Arbitrator.

3. The said petition was opposed by the respondent who denied that they had any agreement with the appellant/petitioner M/s Rajiv Associates Pvt. Ltd. Respondent contended that it had no privity of contract with appellant. It entered into a construction agreement with Rajiv Construction Company in relation to whose disputes, an Arbitrator was appointed. Further that the Arbitrator became functus officio. The petition under section 20 of the Act was preferred by the appellant/petitioner in 1998 for appointment of an Arbitrator under Section 20 of the Act. It was highly belated and barred by limitation. Apart from that, petition was not maintainable as filed.

3. Mr.Moitra firstly submitted that appellant M/s Rajiv Associates Pvt. Ltd was the successor in interest of M/s

Rajiv Construction Company having taken over all the assets and liabilities of the latter. It was, therefore, competent to prosecute the petition on behalf of Rajiv Construction Company. Counsel urged that argument of the respondent that there there was no privity of contract between appellant and respondent was thus fallacious.

4. We find that the learned Single Judge has rightly observed that appellant did not produce anything on record to show that on its incorporation, it had taken over the business of Rajiv Construction Company. The arbitral record also shows that it was Rajiv Construction Company which was a claimant and not the appellant. Moreover, there was no averment made in the present petition under section 20 of the Act that petitioner had taken over assets and liabilities of Rajiv Construction Company. Petitioner had not produced any memorandum of incorporation of objects or articles of association or any document to demonstrate that it had stepped into the shoes of Rajiv Construction Company. Mr.Moitra submitted that Memorandum of Association of Rajiv Associates Private Limited has now been produced on record. He refers to Clause 1 of the Objects which is reproduced for facility of reference:-

> "To manufacture, purchase or otherwise acquire, all or any part of the stock-in-trade, Plant-Machinery, Tools and implements, goodwill, Free-hold and Leasehold premises, Liabilities and running concern of or connected with the business now for a consideration to be paid in cash or in

share to be issued in the name of the partners of Rajiv Construction Co., G-19A, Kalkaji, New Delhi, or their nominees or in any other manner as the said partners may desire or partly in one form and partly in the other as may be mutually agreed to."

5. We find that the above clause at best is an enabling clause and it shows one of the main objects for which appellant company has been formed. Nothing has been placed on record to show that the assets of Rajiv Construction Company were actually acquired by the appellant on consideration in cash or any shares issued in the name of Rajiv Construction Company. In the absence of any such documents or evidence on record, the above would remain only an enabling provision. Besides the averments in this regard duly supported with documents were required to be filed before the learned Single Judge along with the petition. The proper remedy M/s Rajiv Construction Company was to have initially filed a petition under section 28 of the Act for enlarging time to make the award, in the first instance and/or after the resignation of the Arbitrator as claimed, it would be a petition under section 8 of the Act to fill up the vacancy on the refusal of the Arbitrator to act.

6. It is not open for the appellant to have preferred belatedly in the year 1998 a petition under section 20 of the Act. Moreover, we find that present appeal itself has been

preferred belatedly after a period of 97 days for which no plausible explanation has been offered. Certified copy itself was applied after 17 days and thereafter the appellant chose to wait till end of May, 2004 for the court clerk of appellant's counsel to return from his village. The above suggests an absolute, casual and cavalier approach. As noted earlier, the petition, as filed, is even otherwise not maintainable since the Rajiv Construction Company did not seek enlargement of time or in the alternative apply for filling up of the vacancy and appellant chose to file a petition under section 20 of the Act. Appellant has also failed to produce/prove on record that it is the successor-in-interest of Rajiv Construction Company with whom respondents had an agreement. Additionally, appeal is also barred by limitation.

For the foregoing reasons, we find that there is no infirmity in the order of the learned Single Judge. Appeal being devoid of merit and also being barred by limitation is dismissed.

Manmohan Sarin, J.

Manmohan, J.

April 11, 2008
ssb